No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL J. BRYANT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Dennis K. Burke, Former United States Attorney, District of Arizona; Paul K. Charlton, Former United States Attorney, District of Arizona; Thomas B. Heffelfinger, Former United States Attorney, District of Minnesota; David C. Iglesias, Former United States Attorney, District of New Mexico; Brendan V. Johnson, Former United States Attorney, District of South Dakota; and Timothy Q. Purdon, Former United States Attorney, District of North Dakota, as *Amici Curiae* Supporting Petitioner

Eric J. Magnuson
Counsel of Record
Katherine S. Barrett Wiik
Lisa L. Beane
Chelsea A. Walcker
ROBINS KAPLAN LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500
EMagnuson@RobinsKaplan.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Thomas B. Heffelfinger, Paul K. Charlton, David C. Iglesias, Brendan V. Johnson, Dennis K. Burke, and Timothy Q. Purdon[2] are former presidentially appointed United States Attorneys with experience in the prosecution of violent crimes, including domestic violence offenses, in "Indian Country," as defined by 18 U.S.C. § 1151. Specifically:

- Thomas B. Heffelfinger was appointed by both President George H.W. Bush and President George W. Bush as United States Attorney for the District of Minnesota and served from 1991 to 1993 and from 2001 to 2006. During a portion of his time as U.S. Attorney, he served as the Chair of the Attorney General's Advisory Committee's

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

[2] Although Amicus Thomas B. Heffelfinger is a partner at Best & Flanagan LLP, Amicus Paul K. Charlton is a Partner at Steptoe & Johnson LLP, Amicus David C. Iglesias is a Professor at Wheaton College, Amicus Brendan V Johnson is a Partner at Robins Kaplan LLP, Amicus Dennis K. Burke is a Principal at Global Security & Innovative Strategies, and Amicus Timothy Q. Purdon is a Partner at Robins Kaplan LLP, they join this brief solely in their personal capacities, they do not represent or advise the Petitioner in this or any matter, and they have not been involved in this case apart from filing this brief as *amici curiae*.

(the "AGAC") Native American Issue Subcommittee (the "NAIS").[3]

- Paul K. Charlton was appointed by President George W. Bush as United States Attorney for the District of Arizona and served from 2001 to 2007. During his time as U.S. Attorney, he was a member of the AGAC's NAIS.

- David C. Iglesias was appointed by President George W. Bush as United States Attorney for the District of New Mexico and served from 2001 to 2007. During his time as U.S. Attorney, he was a member of the AGAC's NAIS.

- Brendan V. Johnson was appointed by President Barack Obama as United States Attorney for the District of South Dakota and served from 2009 to 2015. During a portion of his time as U.S. Attorney, he served as Chair of the AGAC's NAIS.

- Dennis K. Burke was appointed by President Barack Obama as United States Attorney for

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[3] The AGAC was created in 1973 to serve as the voice of the U.S. Attorneys and to advise the Attorney General of the United States on policy, management, and operational issues impacting the offices of the U.S. Attorneys. The NAIS is comprised of U.S. Attorneys from across the United States whose districts contain Indian Country or one or more federally recognized tribes. The NAIS focuses exclusively on Indian Country issues, both criminal and civil, and is responsible for making policy recommendations to the Attorney General of the United States regarding public safety and legal issues that impact tribal communities.

the District of Arizona and served from 2009 to 2011. During his time as U.S. Attorney, he was a member of the AGAC's NAIS.

- Timothy Q. Purdon was appointed by President Barack Obama as United States Attorney for the District of North Dakota and served from 2010 to 2015. During a portion of his time as U.S. Attorney, he served as Chair of the AGAC's NAIS.

During their terms as United States Attorney, the *amici curiae* led United States Attorney's Offices that prosecuted violent crimes, including domestic violence offenses in Indian Country, under the Indian Country Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153. In fact, Department of Justice statistics establish that the U.S. Attorney's Offices in Minnesota, Arizona, New Mexico, South Dakota and North Dakota—the offices the *amici curiae* led—prosecute the highest numbers of Indian Country criminal cases in comparison to most other U.S. Attorney's Offices.[4]

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[4] *See* U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions 2014*, http://www.justice.gov/tribal/file/796976/download (last visited Jan. 25, 2016); U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions 2013*, http://www.justice.gov/tribal/docs/icip-rpt-cy2013.pdf (last visited Jan. 25, 2016); U.S. Dep't of Justice, *Indian Country Investigations and Prosecutions 2011-2012*, http://www.justice.gov/tribal/tloa-report-cy-2011-2012.pdf (last visited Jan. 25, 2016).

All of the *amici curiae* prioritized the reduction of violent crime on reservations and tribal trust land within their jurisdictions during their time as U.S. Attorney and all are acutely aware of the jurisdictional challenges facing tribal, state, and federal law enforcement officers and prosecutors in their efforts to reduce violent crime, particularly domestic violence offenses, in Indian Country.

SUMMARY OF ARGUMENT

Former U.S. Attorney *amici curiae* Thomas B. Heffelfinger, Paul K. Charlton, David C. Iglesias, Brendan V. Johnson, Dennis K. Burke, and Timothy Q. Purdon can provide this Court with a unique perspective on 18 U.S.C. § 117(a). Each of us has served as a top-ranked federal prosecutor, each of us has firsthand experience with the prosecution of domestic violence offenses in Indian Country, and each of us recognizes the need for a tool like Section 117(a) to target habitual domestic violence offenders who pose the greatest risk of reoffending.

Domestic violence is an escalating crime, with repeat offenders tending to inflict more serious physical injuries upon their victims over time. Research also suggests that treating escalating domestic assaults with escalating criminal justice consequences reduces offender recidivism, which in turn saves lives.

U.S. Attorney's Offices can help to reduce domestic violence, and potentially save lives, on reservations by prosecuting domestic violence crimes before they become homicides. Allowing the Ninth Circuit's decision to stand would eliminate 18 U.S.C. § 117(a) as a critical law enforcement tool for prosecuting habitual

domestic violence offenders. *Amici curiae* recognize how Section 117(a) can help federal prosecutors protect victims of domestic violence who live on reservations by preventing habitual offenders from continuing their escalating patterns of abuse. Therefore, we urge the Court to preserve this tool as a necessary component of the comprehensive efforts to reduce violent crime on reservations, and reverse the Ninth Circuit's decision.

ARGUMENT

I. 18 U.S.C. § 117(A) IS A CRITICAL TOOL FOR FEDERAL PROSECUTORS TO PREVENT SERIOUS DOMESTIC VIOLENCE CRIMES IN INDIAN COUNTRY

A. Domestic Violence Is an Escalating Crime

1. Many domestic violence offenders are recidivists

Empirical research shows that recidivism rates are extremely high among domestic violence offenders, suggesting that domestic violence offenders are particularly likely to reoffend. Numerous studies have documented the recidivist tendencies of domestic violence offenders. Some studies have estimated recidivism rates between forty percent and eighty percent "when victims are followed longitudinally and interviewed directly." Carla Smith Stover, *Domestic Violence Research: Where Do We Go From Here?*, 20 J. Interpersonal Violence 448, 450 (2005).

Other studies that rely on police reports, rather than victim reports, estimate recidivism rates between twelve percent and twenty-one percent. *See* Julia C. Babcock et al., *Does Batterers' Treatment Work?: A*

Meta-Analytical Review of Domestic Violence Treatment, 23 Clinical Psychol. Rev. 1023, 1039 (2004); Donald G. Dutton & Kenneth Corvo, *Transforming a Flawed Policy: A Call to Revive Psychology & Science in Domestic Violence Research & Practice*, 11 Aggression & Violent Behavior 457, 460 (2006). However, these statistics likely underrepresent the actual number of cases of recidivism because domestic violence is widely believed to be underreported. *See* Babcock et al., *supra*, at 1039.

Equally significant, recidivism among offenders often occurs soon after the previous offense. *See* Rodney Kingsworth, *Intimate Partner Violence: Predictors of Recidivism in a Sample of Arrestees*, 12 Violence Against Women 917, 930 (2006). Studies uniformly show that for those abusers who reoffend, a majority do so within a short timeframe. *See* Andrew R. Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, Nat'l Inst. for Justice (June 2009). Many domestic violence offenders recidivate within six months after their initial assault or arrest. *See* J. David Hirschel & Ira W. Hutchinson, III, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Experiment*, 83 J. Crim. L. & Criminology 73, 116 (1992); Christopher M. Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 J. Fam. Violence 263 (1998).

2. Recidivist domestic violence offenders often escalate the severity of their offenses

The United States "witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year." *United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014). This Court has observed that "[d]omestic violence often escalates in severity over time," and that "the presence of a firearm increases the likelihood that it will escalate to homicide." *Id.*

This Court's characterization in *Castleman* of domestic violence as an escalating crime is well supported by research. Multiple studies indicate that domestic violence generally escalates in severity over time. *See* Cynthia Gillespie, *Justifiable Homicide: Battered Women, Self-Defense, and the Law* 129 (1989) (explaining that the number of women hit with an object in the most serious violent incident was double the number hit with an object in the initial incident); Marie L. Crandell et al., *Predicting Future Injury Among Women in Abusive Relationships*, 56 J. Trauma-Injury Infection & Critical Care 906, 906 (2004) (finding that forty-four percent of women who were murdered by an intimate partner had received emergency room treatment within two years of the homicide and almost all had at least one emergency room visit for domestic violence injuries); Alex R. Piquero et al., *Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization, Escalation, and De-Escalation Evidence from the Spouse Assault Replication Program*, 121 Pub. Health Reports 409, 411–18 (2006) (discussing studies

that show that intimate partner violence increases in severity and frequency over time).

These studies show that domestic violence, unchecked, leads to harm with escalating levels of seriousness, with each subsequent act of physical violence by the offender tending to be more serious than the last, and inflicting increasing bodily harm upon the victim over time. Grabbing or shaking may lead to hitting or punching. Choking may follow. Each escalating incident heightens the risk of fatality to victims of domestic violence.

In addition, "[a]s this violence escalates, the likelihood that the violent incidents will involve the use of a weapon also increases." Allison J. Nathan, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 Cornell L. Rev. 822, 824 (2000); *see also* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 901, 1155 (1993) (stating that "[it] is well documented that as domestic violence escalates, batterers often begin using weapons against their victims"). Further, studies show that the presence of a gun dramatically increases the likelihood that the domestic violence will escalate into homicide. *See* Amy Karan & Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination*, Fla. B. J. 79, 79 (2005); *see also* Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. Ctr. Fam. Children & Cts. 3, 3 (2005) (discussing domestic violence homicide statistics in California, New York, and Washington). The too-familiar pattern of escalating domestic violence requires escalating

societal and law-enforcement reactions and consequences.

B. Escalating Domestic Violence Crimes Require Escalating Consequences

The escalating nature of domestic assaults by repeat domestic violence offenders demonstrates a need for escalating criminal justice consequences. A recent study on the impact of differential sentencing severity for domestic violence offenses compared to non-domestic violence offenses found that more severe sentences for domestic violence offenses resulted in fewer additional domestic violence offenses by the same offender. Andrew R. Klein et al., *Impact of Differential Sentencing Severity for Domestic Violence Offenses and All Other Offenses Over Abusers' Life Spans*, Nat'l Inst. for Justice (Sept. 2013). "[A]busers who were prosecuted and sentenced more severely for DV compared to non-DV crimes during the first years of their adult criminal careers were less likely to be arrested for subsequent new DV offenses. They had significantly fewer new DV offenses." *Id.* at 2–3.

The study's authors suggested that their research leads to the "clear" policy conclusion that "sanctions imposed for DV offenses must be more severe than that imposed on the typical non-DV offenses committed by the abusers." *Id.* at 35. By allowing federal prosecutors to charge habitual offenders with a felony, Section 117(a) provides the exact sort of tool that this research suggests reduces repeat domestic violence offenses.

C. Federal Prosecutors Need 18 U.S.C. § 117(a) to Prevent Serious Domestic Violence Crimes in Indian Country

The studies discussed above illustrate the importance of 18 U.S.C. § 117(a) as a tool for targeting habitual domestic violence offenders who pose the greatest risk of reoffending. Using Section 117(a), federal prosecutors can intervene to prevent potential future violence and escalation by offenders and to promote the safety of victims of domestic violence in Indian Country. If Section 117(a) were to be found inapplicable to prior tribal court domestic violence convictions, federal prosecutors would be deprived of an important tool to prosecute repeat domestic violence offenders, weakening the protections for domestic violence victims in Indian Country.[5]

In "Indian Country," as defined by 18 U.S.C. § 1151, federal prosecutors have jurisdiction over assaults that occur on reservations within their jurisdictions. But without Section 117(a) in place, a domestic violence assault constitutes a felony only if it results in

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[5] Other *amici* in this case have addressed the vastly disproportionate rates of domestic violence perpetrated against Native women on reservations. For example, both the National Congress of American Indians and the National Indigenous Women's Resource Center and Additional Advocacy of Organizations for Survivors of Domestic Violence and Assault address how on some reservations, the murder rate of Native women is ten times the national average. (*See* Br. of *Amicus Curiae* National Congress of American Indians; Br. of *Amicus Curiae* National Indigenous Women's Resource Center and Additional Advocacy of Organizations for Survivors of Domestic Violence and Assault.)

"substantial bodily injury" to the victim. *See* 18 U.S.C. § 113(a)(7).[6] The practical effect of the "substantial bodily injury" requirement is that much of the domestic violence that occurs on reservations is beyond the felony prosecution reach of federal prosecutors. As a result, if tribal courts lack the resources to effectively combat domestic violence or if tribal or federal misdemeanor prosecutions are insufficient to deter abuse, victims on reservations—and the Assistant United States Attorneys charged with protecting them—are left with little recourse against the offenders until the abuser eventually inflicts "substantial bodily injury" on the victim.

Section 117(a), however, gives federal prosecutors an additional tool to ensure that victims of domestic violence living on reservations are afforded similar protection against their abusers to victims who live in non-Indian Country jurisdictions. Section 117(a) makes a domestic assault committed on a reservation a felony if the perpetrator has two prior final convictions for domestic assault in a federal, state, or tribal court. *Id.* § 117(a). The inclusion of prior tribal court domestic violence convictions as possible predicates is key as it is tribal courts that adjudicate most misdemeanor domestic violence cases in reservation communities. Federal prosecutors, therefore, can use Section 117(a) to prosecute repeat domestic violence offenders whose

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[6] Although federal prosecutors have the right to charge a misdemeanor offense for assault "by striking, beating, or wounding" under 18 U.S.C. § 113(a)(4), habitual offenders subject to prosecution under Section 117(a) have, by definition, shown that misdemeanor prosecution is insufficient to deter them from committing additional domestic violence assaults.

crimes fall short of causing "substantial bodily injury" but who nonetheless have exhibited, through a record of prior tribal court domestic violence convictions, a pattern of domestic abuse. These habitual offenders are the ones whose escalating violence is most likely to end in the "substantial bodily injury," disfigurement, or even death of their victims. Federal prosecutors should not be required to sit on their hands until that happens; instead, they should be empowered to intervene on behalf of the victims. Since the passage of Section 117(a), they are so empowered.

As former federal prosecutors whose jurisdictions included Indian Country, we know the value of this authority to intervene on behalf of victims and imprison habitual perpetrators of domestic violence. For example, the North Dakota United States Attorney's Office has made active use of Section 117(a) as part of its broader strategy to address unacceptably high rates of violent crime on the reservations in North Dakota. *See generally* Timothy Q. Purdon, *The North Dakota United States Attorney's Office's Anti-Violence Strategy for Tribal Communities: Working to Make Reservations Safer Through Enforcement, Crime Prevention, and Offender Reentry Programs*, 88 N.D. L. Rev 957 (2012).

The case of *United States v. Cavanaugh*, which was prosecuted in federal district court in North Dakota and subsequently reviewed by the Eighth Circuit, provides an example of how 18 U.S.C. § 117(a) can be a critical law enforcement tool for federal prosecutors faced with repeat domestic violence offenders. In *Cavanaugh*, Section 117(a) enabled federal prosecutors to charge the defendant, who was a repeat domestic

violence offender, with a felony before he could inflict substantial bodily harm, or worse, upon his partner, thus resulting in escalating legal consequences proportionate to his escalating domestic assaults. In North Dakota, federal prosecutors brought charges under Section 117(a) against Roman Cavanaugh, Jr. *See id.* at 969–70; *see also United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011). Cavanaugh was a repeat domestic violence offender, who had accumulated four prior tribal court convictions from three prior cases for domestic violence from 2005 to 2008. *Cavanaugh*, 643 F.3d at 594.

The conduct that led to Cavanaugh's federal prosecution stemmed from a fight between Cavanaugh and his common-law wife while they were traveling in a car with children. *Id.* Cavanaugh was driving, and both he and his wife were intoxicated. *Id.* Cavanaugh grabbed his wife's head, jerked it around, and slammed it into the dashboard. *Id.* He also threatened to kill her. *Id.* Cavanaugh pled guilty and was sentenced to sixty-five months in federal prison. Purdon, *supra*, at 970. If federal prosecutors had not had Section 117(a) available to allow them to charge Cavanaugh's escalating violent attacks against his intimate partners as a felony in these circumstances, using his prior tribal-court convictions as predicate domestic violence offenses, then there would have been no way for federal law enforcement to intervene until Cavanaugh had inflicted substantial bodily injury upon his common-law wife, or perhaps even killed her.[7]

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[7] Federal prosecutors in North Dakota used the same strategy to bring several other felony cases against habitual domestic violence offenders. Purdon, *supra*, at 970, 970 n.25.

The statistics on domestic violence, discussed above, suggest that the prosecutions in North Dakota under 18 U.S.C. § 117(a) prevented several domestic assaults by removing dangerous habitual offenders from reservations. Combatting repeated domestic assaults as they escalate in seriousness demands the ability to impose penalties that are similarly escalating in seriousness. The social science evidence on this issue indicates that a pattern of domestic violence is likely to end in serious injury or death of the victim. *See* Crandell et al., *supra*, at 906; Piquero et al., *supra*, at 411–18. Federal authorities can save lives and decrease violence on reservations generally by prosecuting these crimes before they reach a tragic end.

As former federal prosecutors with firsthand experience in the prosecution of domestic violence offenses in Indian Country, we recognize how Section 117(a) can help federal prosecutors protect victims of domestic violence who live on reservations by preventing habitual offenders from continuing their escalating patterns of abuse. We therefore urge the Court to preserve this tool as a necessary component of the comprehensive efforts to reduce violent crime on reservations. Our conclusion that Section 117(a) is a critical tool is no mere academic exercise; to the contrary, we have seen firsthand that whether federal prosecutors are able to prosecute habitual domestic violence offenders has very real, and potentially grave, implications for the safety of Native women living in Indian Country.

CONCLUSION

In order to preserve 18 U.S.C. § 117(a) as the critical law enforcement tool for prosecuting habitual domestic violence offenders, the former United States Attorney *amici curiae* urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

Eric J. Magnuson
Counsel of Record
Katherine S. Barrett Wiik
Lisa L. Beane
Chelsea A. Walcker
ROBINS KAPLAN LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500
EMagnuson@RobinsKaplan.com
KBarrettWiik@RobinsKaplan.com
LBeane@RobinsKaplan.com
CWalcker@RobinsKaplan.com

Counsel for Amici Curiae